UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Mirant Americas Energy Marketing, L.P.,
Mirant New England, LLC,
Mirant Kendall, LLC,
and Mirant Canal, LLC

Docket Nos. EL01-93-010
v. EL01-93-011

ISO New England Inc.

ORDER DENYING REHEARING AND
CLARIFCIATION

(Issued July 11, 2005)

1. This order denies rehearing requests and a request for clarification (Docket No. EL01-93-010) of the Commission's Order on Remand;[1] in that order, the Commission had explained that its waiver of the 60-day prior notice requirement was properly granted because of "extraordinary circumstances" presented. This order also denies a request for

[1] *Mirant Americas Energy Mktg., L.P., et al. v. ISO New England Inc.*, 96 FERC ¶ 61,201 (2001) (August 10, 2001 Order), *clarification granted and reh'g denied*, 97 FERC ¶ 61,108 (2001) (October 26, 2001 Order), *clarification granted and reh'g denied*, 97 FERC ¶ 61,360 (2001), *clarification and reh'g denied*, 99 FERC ¶ 61,003 (2002) (April 1, 2002 Order), *clarification granted*, 103 FERC ¶ 61,018 (2003), *remanded sub nom. NSTAR Elec. & Gas Corp. v. FERC*, No. 02-1047, 2003 U.S. App. LEXIS 8078 (D.C. Cir. Apr. 28, 2003) (*NSTAR*), *order on remand*, 105 FERC ¶ 61,359 (2003) (Order on Remand), *order on compliance filing*, 106 FERC ¶ 61,243 (2004) (Order Accepting Compliance Filing).

rehearing (Docket No. EL01-93-011) of the Commission's Order Accepting Compliance Filing.[2] These decisions benefit customers because they preserve certain generators' ability to recover legitimate costs of providing critical generation services during transmission constraints.

Background to Both Proceedings

2. Prior to the effective date of the New England Standard Market Design (NE-SMD),[3] Market Rule 17 set the procedures for ISO New England Inc. (ISO-NE) to mitigate generation resources that run out-of-economic merit order[4] during periods of transmission constraints.[5] Initially, Market Rule 17 provided that bids by owners of resources that seldom run in economic merit order would be subject to mitigation down to default reference prices set forth in Tables 1 and 2 of Market Rule 17 unless the owners agreed with ISO-NE through voluntary arrangements to restrict their bids through mitigation agreements. In this regard, Market Rule 17 further provided that the "ISO may enter into negotiation with a resource owner for any reasonable payment terms if the ISO reasonably expects the markets will function more reliably, competitively or efficiently as a result [*i.e.*, to ensure that the generator remains available during transmission constraints]."[6] ISO-NE passed through to load the difference between the mitigation agreement price and a lower energy clearing price as a component of an "uplift" charge.

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[2] *Id.*

[3] The Commission authorized ISO-NE to implement the Standard Market Design for New England (NE-SMD) on March 1, 2003. *See New England Power Pool and ISO New England Inc.*, 102 FERC ¶ 61,248 (2003). As a result, ISO-NE no longer negotiates mitigation agreements under Market Rule 17. Instead, pursuant to the NE-SMD, any mitigation agreements that ISO-NE enters into now must comply with the negotiating authority given to ISO-NE under Appendix A of Market Rule 1. *See ISO New England Inc.*, 103 FERC ¶ 61,320 at P 2 n.3 (2003).

[4] In a system in which generation is normally dispatched in order of economics beginning with the lowest cost generation, an out-of-merit generator is dispatched not because it is economic to do so but for reliability reasons.

[5] Transmission constraints limit a system's capability to import electricity into a particular area (load pocket) and thereby require ISO-NE to dispatch a generator located within the load pocket out of economic merit order to serve load, to protect the system from voltage collapse, or to prevent some other instability.

[6] Market Rule 17.3.3(b) n.9.

3. On May 31, 2001, ISO-NE proposed revisions to Market Rule 17. In the August 10, 2001 Order,[7] the Commission determined that proposed modifications were material changes to that rule, and required them to be filed under section 205 of the Federal Power Act (FPA).[8] In response to a request for clarification of that order, in the October 26, 2001 Order, the Commission required the filing, pursuant to section 205 of the FPA, of all mitigation agreements negotiated under Market Rule 17.[9] In addition, citing *Central Hudson Gas and Electric Corporation*,[10] the Commission granted ISO-NE a waiver of the 60-day prior notice requirement.[11] In the April 1, 2002 Order, the Commission further explained that, because the 60-day prior notice requirement had been waived, time-value refunds, which are based on a rate being charged without authorization, were not in order.[12]

4. Prior to the Commission issuing the April 1, 2002 Order, NSTAR Electric & Gas Corporation (NSTAR) appealed the Commission's decision to grant waiver of the 60-day prior notice requirement and to not require ISO-NE to pay time-value refunds. On April 28, 2003, the D.C. Circuit remanded the proceeding to the Commission, directing the Commission to explain further its decisions to grant waiver and to not order refunds.[13]

5. In the Order on Remand, the Commission clarified the basis for waiver of the 60-day prior notice requirement and the related determination that no time-value refunds were warranted. Specifically, the Commission explained that waiver of the 60-day prior notice requirement was justified under the extraordinary circumstances standard set forth in *Central Hudson*, because ISO-NE was authorized to enter into such agreements for purposes of protecting system reliability, and generators typically would not have much (if any) advance warning that such an agreement might be required.[14] Because the

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[7] 96 FERC at 61,860.

[8] 16 U.S.C. § 824d (2000).

[9] 97 FERC at 61,556.

[10] 60 FERC ¶ 61,106 (*Central Hudson I*), *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson II*) (collectively, *Central Hudson*).

[11] 97 FERC at 61,554.

[12] 99 FERC at 61,019 n.8.

[13] *NSTAR* at 3-4.

[14] Order on Remand at P 14-15.

Commission had waived the 60-day prior notice requirement, the Commission stated that there was never a time the rates were charged without the Commission's authorization, and thus no time-value refunds were warranted.[15]

6. On March 9, 2004, the Commission issued the Order Accepting Compliance Filing. The Commission explained that it had reviewed the mitigation agreements and, based on that review, found that they were just and reasonable.[16] The Commission also found that the mitigation agreements were consistent with Market Rule 17.[17] Finally, the Commission found that, because the prices received by the generators under the mitigation agreements were just and reasonable, ordering refunds would not be appropriate, and, consistent with the determination in the Order on Remand to waive the 60-day prior notice requirement, ordering time-value refunds also would not be appropriate.[18]

Docket No. EL01-93-010

7. Mirant Americas Energy Marketing, L.P., Mirant New England, LLC, Mirant Kendall, LLC, and Mirant Canal, LLC (collectively, Mirant) state that they support the Commission's holding in the Order on Remand that no refunds are warranted with respect to the mitigation agreements. However, Mirant requests that the Commission clarify the basis for that holding. In addition, Mirant asks that the Commission clarify the basis for its related finding in the April 1, 2002 Order, which was not subject to review by the D.C. Circuit. In particular, Mirant asks that the Commission make clear, as it did in its April 1, 2002 Order, that, because the agreements were entered into under ISO-NE's blanket authority under Market Rule 17, the Commission did not have to make an individual determination, pursuant to section 205 of FPA, as to the justness and reasonableness of the individual mitigation agreements.

8. In its answer to Mirant's motion for clarification, the Maine Public Utilities Commission (Maine Commission) states that Mirant's request for clarification should be rejected because: (1) the Commission's Order on Remand, although in error, is quite clear that it denied all refunds; and (2) the Commission's statement in the April 1, 2002 Order that it did not have to review the justness and reasonableness of each mitigation

[15] *Id*. at P 11.

[16] Order Accepting Compliance Filing at P 14.

[17] *Id.* at P 23.

[18] *Id.* at P 24-25.

agreement is inapplicable to the issue here of whether refunds should be granted if, as the Maine Commission maintains, there was no permissible basis for granting a waiver in this proceeding.

9. In addition, NSTAR and the Maine Commission both seek rehearing of the Order on Remand. Specifically, NSTAR argues that the Order on Remand fails to demonstrate extraordinary circumstances that would support granting waiver of the 60-day prior notice requirement. For instance, according to NSTAR, the rates on file (Tables 1 and 2 in Market Rule 17) were reviewed and approved by the Commission as just and reasonable rates under section 205 of the FPA; therefore, those prices would have afforded generators subject to mitigation appropriate compensation at least for variable costs for their service. Moreover, NSTAR maintains that the Commission's assertions that the mitigation agreements were required to fulfill a reliability need do not rise to the level of constituting extraordinary circumstances.

10. NSTAR and the Maine Commission argue that, in permitting the mitigation agreements at issue in this case to take effect prior to the date the agreements were actually filed, the Commission violated *Central Hudson*. In this regard, the Maine Commission argues that the Commission's grant of waiver of the prior notice requirement in this proceeding was inconsistent with a recent decision by the D.C. Circuit, which, in upholding another Commission order, stated that "FERC's good cause waiver authority does not permit it to make a retroactive rate adjustment."[19] The Maine Commission asserts that there are no circumstances, including the *Central Hudson* extraordinary circumstances test, under which, absent prior actual notice, the Commission can give effect to a rate change prior to the date of the filing.

11. In addition, NSTAR maintains that the Commission misconstrued section 205 of the FPA when it concluded that, because it granted waiver of the 60-day prior notice requirement, refunds are not necessary. According to NSTAR, since the prices under the mitigation agreements were unlawful, amounts collected under the agreements in excess of the rates on file (*i.e.*, under Tables 1 and 2 in Market Rule 17) must be refunded to customers. Finally, NSTAR asserts that the vast majority of the agreements do not constitute contracts for which the Commission may waive the 60-day prior notice requirement, because they are memoranda summarizing oral agreements between ISO-NE and an applicable generator.

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[19] Maine Commission Request for Rehearing at 3 (*citing Consolidated Edison Co. of NY, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (*Edison*).

Docket No. EL01-93-011

12. NSTAR requests rehearing of the Order Accepting Compliance Filing, arguing that the Commission erred by not reviewing the cost support data for the mitigation agreements, and thereby in failing to support its findings with substantial evidence. NSTAR also alleges that the Commission improperly delegated ratemaking authority to ISO-NE and ignored ISO-NE's violations of Market Rule 17. Finally, NSTAR asserts that the Commission erred by relying on the Remand Order to support its decision not to order refunds.

Discussion

Docket No. EL01-93-010

Waiver

13. NSTAR argues that the Order on Remand fails to demonstrate extraordinary circumstances that would support granting waiver of the 60-day prior notice requirement. We disagree. The Commission has indicated that it will generally grant waiver when agreements for service are filed after service has commenced (as these mitigation agreements were), if extraordinary circumstances are present.[20] As we explained in the Order on Remand and as we elaborate now, such extraordinary circumstances are present here.

14. The mitigation agreements were designed to allow a generator needed to assure system reliability and security to run, and yet still mitigate, consistent with the intent of Market Rule 17, the potential exercise of market power by that generator during periods of transmission constraints. Because these agreements were for critical services, under Market Rule 17, ISO-NE was authorized to enter into such mitigation agreements for "any reasonable payment terms," to ensure both that the generator remained available during transmission constraints and customers were protected from an exercise of market power.[21] As the Commission explained in the Order on Remand:

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[20] 60 FERC at 61,339. In *Central Hudson II*, the Commission addressed the contention that it had replaced the good cause standard with the extraordinary circumstance standard. The Commission explained that *Central Hudson I* simply elaborated that, when a filing is made after the commencement of service (and thus the Commission has no prior notice), the filing utility must make a stronger showing of good cause for waiver than if the filing had been made prior to the commencement of service. 61 FERC at 61,355.

[21] *See* Market Rule 17.3.3.

> Absent the mitigation agreements (and the prices allowed in the agreements) there would be little incentive for generators . . . to make their generation available to supply services needed for system reliability and security and thus provide a needed benefit to the entire market and electricity customers.[[22]]

15. *Central Hudson* also instructs that, in deciding waiver cases, the Commission should balance the need to deter violations of the FPA filing requirements with the requirement that rates not be confiscatory.[23] Here, not granting waiver would inequitably penalize the resource owners, who ran those resources at ISO-NE's direction to meet a reliability need, because ISO-NE in good-faith, albeit erroneously, determined that the mitigation agreements did not need to have been filed.

16. NSTAR and the Maine Commission further argue that the Commission lacked authority to grant waiver and allow the rates to become effective before they were actually filed.

17. We disagree.[24] Section 205(d) of the FPA expressly confers on the Commission the discretion to waive the prior notice requirement and to determine the effective date of proposed rate changes.[25] Section 205(d) of the FPA, in short, allows waiver of the prior

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[22] Order on Remand at P 14.

[23] *Central Hudson II* at 61,357.

[24] Interestingly, in the past, NSTAR itself sought and was granted waiver of the 60-day prior notice requirement. *E.g., NSTAR Companies*, 97 FERC ¶ 61,288 at 62,298-99 & n.5 (2001) (waiver requested and granted to allow rates to become effective one day after date of filing).

[25] Section 205(d) provides:

> The Commission, for good cause shown, may allow changes to take effect without requiring the sixty day's notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

See also 18 C.F.R. §§ 35.3, 35.11 (2003); Order on Remand at P 10 (describing the Commission's prior notice policy). Indeed, as observed in *Gulf States Utilities Company v. FERC*, 1 F.3d 288, 293 (5th Cir.1993) (*Gulf States*), waiver necessarily presupposes a failure to timely file.

notice requirement and allows rates to become effective on less than 60 days' notice once waiver is granted.[26] And section 205 nowhere prohibits the Commission's granting waiver to allow an effective date that pre-dates the filing date. If it did, then buyers arguably would *never* be able to buy and sellers arguably would *never* be able to sell unless they first filed; transactions now routinely undertaken "quickly" to take advantage of favorable price fluctuations arguably would become impossible.[27]

18. The Maine Commission further argues that the D.C. Circuit, in *Edison*, found that "prior notice waiver authority could not be used to give a rate retroactive effect absent actual notice to affected parties,"[28] and also found that "FERC's good cause waiver authority does not permit it to make a retroactive rate adjustment."[29] That, however, is not what occurred here. In this matter, unlike the facts presented in *Edison*, the Commission's decision to grant waiver did not retroactively change anyone's rates during the period the mitigation agreements were in effect, *i.e.*, the rates authorized were no higher than the rates actually charged and, in fact, were the same. Therefore, the filed rate doctrine and the rule against retroactive ratemaking are inapposite to this matter.

19. Moreover, even assuming that the rule against retroactive ratemaking was applicable to this case, the D.C. Circuit noted in *Edison* that courts have recognized that a rate may take effect prior to a section 205 filing. In this regard, Market Rule 17 allowed ISO-NE to do what it did, and Market Rule 17 was the subject of Commission proceedings and Commission approval, including express authorization for ISO-NE to

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[26] Courts have expressly affirmed the Commission's authority to deem rates effective as of the date agreed upon by the parties, even though they are not filed until months or years later. *See, e.g.*, *City of Holyoke Gas & Electric Department v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) (affirming in pertinent part Commission orders waiving 60-day prior notice requirement and allowing rate to become effective in 1988, even though contract was not filed until 18 months later); *accord Barton Village, Inc., et al. v. Citizens Utilities Co.*, 99 FERC ¶ 61,111 (2002) (granting waiver of prior notice requirement and not ordering refunds for previously-unfiled, pre-1983 agreements), *reh'g denied*, 100 FERC ¶ 61,244 (2002) (same), *aff'd in relevant part*, No. 02-4693 (2d Cir. June 17, 2004) ("we do not find that FERC's refusal to grant refunds is an abuse of discretion that we can rectify while granting proper deference to FERC").

[27] *See Prior Notice & Filing Requirement Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,982-84, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

[28] Maine Commission Request for Rehearing at 3 (citing *Edison* at 969).

[29] *Edison* at 969.

negotiate mitigation agreements, well before the particular agreements at issue here were executed.[30] ISO-NE's authority to negotiate mitigation agreements was part of a filed and accepted tariff, and market participants were on notice of its provisions.

20. Accordingly, because the explanation for ISO-NE's lateness in filing the mitigation agreements meets the statute's and the Commission's more specific requirements,[31] we reiterate that the Commission's waiver of the prior notice requirement was appropriate in this case.

Refunds

21. NSTAR and the Maine Commission argue that the Commission should reverse its decision in the Order on Remand to not order refunds, because ISO-NE was collecting rates in excess of the Market 17 default formula rates, which they argue are the only filed rates. On the other hand, Mirant requests that the Commission clarify that refunds are not in order.

22. First, with regard to the issue of the Commission not ordering time-value refunds, as the Commission explained in the Order on Remand and as discussed above, even though ISO-NE did not timely file the mitigation agreements, the Commission waived the prior notice requirement and, thereby, allowed them to become effective as of the date agreed upon by the parties. Because the Commission granted waiver, there was no period during which the rates were charged without the Commission's authorization. Accordingly, there is no period for which the Commission should order time-value refunds.[32] In other words, because the Commission exercised its discretion to waive the prior notice requirement, there is no need to remedy a late filing.

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[30] *See New England Power Pool*, 85 FERC ¶ 61,379 (1998).

[31] The jurisdictional guidance in *Central Hudson* was general, rather than case-specific. As the Commission stated in *Central Hudson II*, "we will continue to consider requests for waiver of the notice requirement based on the specific factual circumstances of each filing." 61 FERC at 61,356.

[32] *See Carolina Power & Light Company*, 84 FERC ¶ 61,103 at 61,522 (1998) (explaining that a time-value refund computes a refund that is directly proportional to the amount of money billed *without authorization* and the length of time such revenues were collected *without authorization*), *order on reh'g*, 87 FERC ¶ 61,083 (1999).

23. In addition, the rates, terms, and conditions on file allowed ISO-NE to negotiate pursuant to Market Rule 17, and so ISO-NE was authorized to charge rates that reflected its negotiations pursuant to Market Rule 17. In short, ISO-NE did not charge rates in excess of the filed rate.[33]

24. If the Commission were to "remedy" ISO-NE's failure to timely file the mitigation agreements by ordering refunds for the difference between the price received by generators under the mitigation agreements and the price in the default formula rate in Tables 1 and 2 of Market Rule 17, it would produce an inequitable result. The default price was determined as a percentage of the current hourly energy clearing price for ISO-NE. That clearing price applies to all bidding units and, thus, will almost invariably be well below the actual costs of running a seldom-run unit. Not ordering refunds preserves the generators' ability to recover legitimate costs of supplying, at ISO-NE's request, needed reliability service. Requiring generators to refund the payments they received under the mitigation agreements, to the extent they were in excess of the Market Rule 17 default formula rates, could even reduce their payments to levels below their variable costs for providing a necessary reliability service.[34] As the Commission noted in the October 26, 2001 Order, Market Rule 17 provides that resources lacking a

[33] Further, even if, arguendo, the rates charged could be said to exceed those on file, the FPA does not mandate refunds whenever the rate charged exceeds that on file. *See, e.g. Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67 at 73 (D.C. Cir. 1992) (rejecting argument that the filed rate doctrine compels refunds of amounts charged in excess of the filed rate). Instead, "refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.'" *Id*. at 75 (citations omitted). As discussed below, the equities weigh strongly against awarding refunds in this instance.

[34] In *Prior Notice*, 64 FERC at 61,979-80, in the context of establishing a remedy to address late filings, the Commission reversed its policy of ordering refunds down to the amount of a utility's variable costs, finding that remedy too harsh, and instead imposing a remedy based on the time value of the additional revenues collected. Here, NSTAR's proposed refunds may be even more extreme, as it might not allow many generators recovery of even their variable costs.

history of operating in economic order, such as generators built primarily to ensure system reliability, "should be entitled to receive a very high bid price or have a special contractual arrangement [such as a negotiated mitigation agreement] to ensure their availability when needed to support system reliability and security."[35]

25. Finally, we deny Mirant's request for further clarification. We see no sound reason why we need to say more than we already have said.

Docket No. EL01-93-011

26. NSTAR raises on rehearing here the same issues it raised in Docket No. ER03-631-002, a rehearing of the Commission's order in *ISO New England Inc.*,[36] which deals with three mitigation agreements ISO-NE executed with other generators. We address those arguments more fully in the rehearing order we are issuing concurrently in that proceeding and we deny rehearing here for the same reasons.

The Commission orders:

The requests for rehearing and the request for clarification are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

[35] 97 FERC at 61,555 n.2 (quoting Section 17.3.2.2(b) of Market Rule 17).

[36] 103 FERC ¶ 61,320 (2003).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Americas Energy Marketing, L.P., Mirant New England, LLC, Mirant Kendall, LLC, and Mirant Canal, LLC

Docket Nos. EL01-93-010
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v.

ISO New England, Inc.

(Issued July 11, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part:*

I dissent from the portion of the Commission's decision to deny rehearing of the Order Accepting Compliance Filing and to grant waiver of the 60-day prior notice requirement.

In my view, Market Rule 17 was an improper delegation of the Commission's ratemaking authority to ISO-NE. Section 205 of the FPA vests exclusive authority with the Commission to set the rates and charges for wholesale electric sales of energy.[1] In doing so, the Commission must determine that the rates and charges approved are just and reasonable. Under *U.S. Telecomm. Ass'n v. FCC*, [2] federal agencies such as the Commission cannot delegate their authority to outside entities--private or sovereign--absent an affirmative showing of congressional authorization.[3] The FPA contains no provision authorizing the Commission to delegate its ratemaking authority. Since ISO-NE is an outside party, the Commission cannot lawfully delegate its ratemaking authority to the ISO.

[1] 16 U.S.C. § 824d (2000).

[2] 359 F.3d 554 (D.C. Cir. 2004)

[3] *Id.* at 565-66.

In the Order Accepting Compliance Filing, the Commission side-stepped the issue of whether the mitigation agreements were required to be filed under section 205. Instead, the Commission's review of the agreements principally focused on whether the agreements were "reasonable," consistent with the requirements of Market Rule 17.[4] The Commission emphasizes that "Market Rule 17 allowed the ISO-NE to do what it did."[5] I do not disagree that ISO-NE acted in accordance with its authority under Market Rule 17; rather, the problem lies with Market Rule 17 itself. I believe that the Commission improperly delegated its ratemaking authority to ISO-NE when it authorized the ISO under Market Rule 17 to enter into mitigation agreements without requiring that the agreements be filed with and approved by the Commission under section 205.

I also disagree with the Commission's determination that extraordinary circumstances exist to grant waiver of the 60-day prior notice requirement for these mitigation agreements. In my view, it is an inappropriate exercise of the Commission's waiver authority to give retroactive effect to mitigation agreements on the basis that they comply with Market Rule 17 when the Commission has not properly reviewed and found the agreements to be just and reasonable.

However, I ultimately agree with the Commission's decision not to order refunds in this instance for the reasons set forth in the Commission's order. As a result, I dissent in part from the Commission's order.

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Joseph T. Kelliher

[4] Market Rule 17.3.3(b) n.9 permitted ISO-NE to negotiate and enter into mitigation agreements "for any reasonable payment terms."

[5] Order at P 19.